IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing Finance
Agency
Two World Trade Center
New York, New York 10047
212—488-3446

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General

MEMBERS OF THE BAR OF THE
UNITED STATES SUPREME COURT
of Counsel

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

Jurisdiction

On January 20, 1975, this Court granted the petitions of the State of New York and the New York State Housing Finance Agency for a writ of certiorari herein; and consolidated this case with *United Housing Foundation, Inc. v. Forman* (No. 74-157) in which a petition for certiorari

was also granted to review the judgment of the United States Court of Appeals entered June 12, 1974 (Appendix C to petition in No. 74-157). Rehearing had been denied to the State petitioners by a Court of Appeals order dated September 12, 1974 (Appendix D to petition in No. 74-647).

The Questions Presented

1. To avoid repetition, we state our support, at the outset, for the arguments made by the petitioners in the United Housing Foundation case (74-157) and for their position that the subscriptions to shares in the Foundation's cooperative development did not constitute "securities" within the contemplation of the Securities Act of 1933 or the Securities Exchange Act of 1934.

We shall confine ourselves to the following additional questions:

2. Does a State waive its Eleventh Amendment immunity from suit in the federal courts by regulating the issuance of share membership in a cooperative housing corporation and by supervision of the construction of a low and middle income housing project, essentially non-profit in nature, particularly where such a corporation is furnished substantial subsidies through the aid in financing it received through mortgages provided at low interest rates by the State Housing Agency?

3. Did the Court of Appeals misconstrue New York Private Housing Finance Law § 32(5) by giving it a blanket waiver construction (not shown to be attributed to it by the New York courts), even though the statute permits the State, its Commissioner or its "supervising agency" (which the Housing Finance Agency is *not*) to be sued in the same manner as a private person, but only as to duties and liabilities arising out of Article 2 of the New York Private Housing Finance Law (known as the Mitchell-Lama Law)?

Opinions Below

The opinion of the Court of Appeals is reported at 500 F. 2d 1246. The opinion of the District Court is reported at 366 F. Supp. 1117. See also Appendices A and B to petition in No. 74-157.

The Statutes and Rules Involved

In addition to the statutes and rules involved in case No. 74-157, there is here involved New York Private Housing Finance Law, § 32(5), which we reproduced as Appendix E to our petition for certiorari (p. 18).

Statement of the Case

To avoid repetition, we adopt the statement set forth in the brief for the petitioners in case No. 74-157 (pp. 4-15).

Proceedings Below

We also adopt as correct the analysis of the proceedings below contained in the brief of the petitioners in Case No. 74-157 (pp. 5-7).

As to the State petitioners, it should be noted, however, that the Second Circuit passed upon Eleventh Amendment and immunity issues which the District Court, in dismissing the complaint herein, did not even reach. The Court of Appeals held the New York State Housing Finance Agency to be a "person" within the meaning of 42 U.S.C., § 1983; and found that the State itself had expressly waived immunity by the provisions of New York Private Housing Finance Law, § 32(5). See 500 F. 2d 1246, 1255-1257.

Preliminary Point

The Court of Appeals decision on the State's Eleventh Amendment and immunity defenses imposes an unnecessary and unconscionable burden on the District Court.

(1)

In the event that this Court were to permit the State's regulation of the development and financing of this new City to become the subject of litigation in federal Courts, it may be anticipated that an appropriate review of the details of such development and financing will also encumber the calendars of one or more District Court judges for years.

As a matter of court administration, this Court, even though it might not ordinarily choose to pass prior to final judgment, upon the Eleventh Amendment and immunity issues which we urge were erroneously decided by the Second Circuit, will surely recognize that it is judicially desirable not to burden the District Court with the task of reviewing unnecessarily the extraordinary issues which the State's defense of its regulatory processes will entail.

If this case were to go back to the District Court in its present posture, with the Second Circuit's rulings on the Eleventh Amendment and immunity issues as the law of the case, the State may be obligated, upon a step-by-step basis, to attempt to justify each of the regulatory decisions involved in the development, construction and financing of the new City of 15,400 housing units. Our new Rome was not built in a day. Moreover, it was built during a period when an unprecedented inflationary economy caused the developers and regulatory agency to reevaluate prior judgments repeatedly to meet constantly changing conditions. A mass of material may accumulate in this single trial which will approach the volume presented to this Court in its current October Term. If this accumulation can be dispensed with, it should be.

(2)

We shall assume, for the purpose of our argument, that the State was engaged in the regulation of "securities" in the development of this cooperatively organized, state subsidized and state-aided housing development. Of course, we adhere to the argument presented by our co-defendants (in case No. 74-157) that the State's regulation did not relate to "securities" as *federally* defined.

POINT I

The Court of Appeals completely disregarded this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974). By reason of this lapse and its failure to understand the history of New York's efforts to develop adequate housing facilities, it erroneously relied upon *Parden* v. *Terminal Railway of Alabama Docks Department,* 377 U.S. 184 (1964); and held *Employees* v. *Missouri Health Department,* 411 U.S. 279, to be distinguishable.

(1)

In determining whether Congress has, in a particular instance, exercised its power to require waiver of immunity, federal courts must, of course, exercise their skills in statutory construction. Fortunately, this Court has given a great deal of recent guidance in how these skills are to be exercised.

The first question which must be answered is whether Congress has authorized a suit of the sort sought to be brought against a class of defendants which includes the States. Justice Rehnquist stated this requirement in *Edelman, supra,* as follows (p. 678):

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."

When the instant case is measured against that standard, it fails. Congress has never authorized suit under either the 1933 or 1934 Acts against a class of defendants including States for violations of Section 17(a) of the 1933 Act or Section 10(b) of the 1934 Act.

Consider first the 1934 Act, upon which the plaintiffs principally rely. That statute contains no section authorizing a private right of action against *any* defendant for violation of Section 10(b). Section 10(b), as written by Congress, was to be enforced by the Securities Exchange Commission.

Of course, the courts have implied a private right of action for violations of Section 10(b) and Rule 10b-5. But Mr. Justice REHNQUIST makes it clear that an implied right of action will not satisfy the "threshold" test of *Edelman* (p. 679):

> "And while this Court has, in cases such as *J. I. Case* v. *Borak,* 377 U. S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."

The logic of Justice Rehnquist's position is convincing. The question before a court looking at an asserted implied waiver of the Eleventh Amendment is whether Congress intended to require that waiver. Surely no Congressional intent to require waiver can be found in court creation of a private right of action.

Just as there is no Congressional authorization under the 1934 Act to sue a class of defendants including States, so also there is no such authorization under the 1933 Act for violations of Section 17(a). Section 17 of the 1933 Act is a criminal provision, obviously intended by Congress to be enforced as are all federal criminal laws. Congress created no private right to sue for violation of Section 17.

Some courts have implied a private right of action for violation of Section 17(a), *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968). But an implied private right of action does not meet the "threshold" test of *Edelman.*

In sum, neither statute relied upon by the plaintiffs is sufficient to satisfy the test of *Edelman* v. *Jordan.* In neither act has Congress authorized suit against States for the sorts of violations alleged in the Complaint here.

(2)

In addition, this Court requires a showing that Congress intended to abrogate State immunity. *Edelman, supra,* at 678.

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, Parden* and *Petty* v. *Tennessee-Missouri Bridge Comm'n.,* 359 U. S. 275 (1959)] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."

This showing must be a strong one, since

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." *Id.*

The court in *Edelman* adhered to its previous standard of explicit abrogation of the immunity,

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)." *Id.*

Even if there were a right of action against States under the 1933 and 1934 Acts, that would not necessarily imply

Congress intended federal court jurisdiction of that right. In *Employees, supra,* this Court affirmed its previous holding (*Maryland* v. *Wirtz,* 392 U.S. 183 (1968)) that Congress had created a right of action against the States. But the Court denied this right implied any remedy by suit in federal court. In fact, the teaching of *Employees* is that Congress can and does create rights without remedies, at least where the remedy sought is a suit against an unconsenting State in federal court.

(3)

In both the 1933 and 1934 statutes, Congress carefully preserved the jurisdiction of the States to regulate securities. Section 18 of the 1933 Act provides:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." (15 U.S.C. § 77r)

In nearly identical language, Section 28 of the 1934 Act preserves State jurisdiction under that Act (15 U.S.C. § 78bb). It would be strange, indeed, to discover that Congress had taken such great pains explicitly to protect State regulation of securities and then silently intended that, if any State exercised that jurisdiction, it would forfeit its Eleventh Amendment immunity.

Indeed, such an argument is self-defeating. If the States had to risk federal court damage suits for huge amounts of money by regulating securities, they would all surely abandon the field. But that is clearly not what Congress intended when it so explicitly protected their jurisdiction.

(4)

In *Parden,* there was a statute which satisfied the "threshold" test of *Edelman* (See *Edelman* opinion at 678), but that is certainly not the case here. Entirely apart from

Edelman, the reach of *Parden* is severely restricted by *Employees*. In the latter case, Mr. Justice Douglas explained (p. 256):

> "Parden involved the railroad business which Alabama operated 'for profit.' [citation omitted.] Parden was in the area where private persons and corporations normally ran the enterprise."

Alabama was engaged in what Justice Douglas called an "isolated state activity" of a proprietary nature usually performed by private enterprise. There was no logical reason to exclude the tiny minority of railroad workers employed by States from the coverage of the FELA. The Court found Congress intended no such exclusion. Proprietary operation of a railroad is no essential governmental function and Alabama entered into it, the Court found, knowing it would waive its Eleventh Amendment immunity thereby.

The kind of implicit waiver found in *Parden* is as far as this Court would go. Justice DOUGLAS held the operation of state hospitals involved in *Employees* was not a proprietary, but a governmental, function. (*Id.* at 256). And Justice MARSHALL, concurring, agreed Missouri had no real choice about operating its hospitals and thus did not "consent" to federal jurisdiction by continuing to operate them after the FLSA was amended. He said (p. 263):

> "For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of the case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver . . . [In contrast with *Parden*]. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit."

If the ownership and operation of state hospitals is not a proprietary act which waives Eleventh Amendment im-

munity, *a fortiori* a purely governmental act such as regulation of securities does not do so.

In *MacKethan* v. *Commonwealth of Virginia,* 370 F. Supp. 1 (E. D. Va. 1974), Judge Merhige faced precisely the same issue which is now before this Court. There a receiver of a savings and loan association sought to hold the Virginia banking authorities liable under the federal securities legislation on grounds of negligent supervision. Judge Merhige dismissed the Complaint, stating (370 F. Supp. 1, 4):

> "Plaintiff now attempts to extend the *Parden* doctrine into the area of pure governmental regulation. Such effort, in the Court's view, must fail. The impetus toward application of the *Employees* rationale is stronger here than in the case in which it was announced. While the operation of hospitals is not necessarily a governmental function, the specific nature of the hospitals involved in *Employees* gave state activity in that area a traditional base. In the present context, the state activity attacked is necessarily of a governmental nature. Regulation of securities is not an endeavor in which private persons are free to participate."

There is no language in the 1933 or 1934 Acts to support the plaintiffs' theory of waiver. *Employees* holds waiver must be supported by explicit language and fails to find it in the semi-proprietary activity of owning and operating hospitals. Judge Merhige in *MacKethan* supports the conclusion that the securities situation here is even clearer than *Employees.* See also the opinion of Judge Hogan in *Mathews* v. *Fisher,* No. 8482 (S. D. Ohio 1974).

The Second Circuit's theory of waiver is not sound in any respect.

(5)

Moreover, the panel completely ignored the caveat given by Judge FRIENDLY with reference to State immunity from suit in *federal* courts, in a decision by this very same Circuit. In *Knight* v. *State of New York,* 443 F. 2d 415 (2d Cir., 1971) he carefully noted (p. 419):

> "the Supreme Court has admonished that federal courts ought not 'to be astute to read the consent to embrace a Federal as well as state courts and that only a 'clear indication' of the state's intention to submit to suit in federal courts will surmount the Eleventh Amendment's bar, *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944). See, to the same effect, *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Kennecott Copper Corp.* v. *State Tax Comm.,* 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946). We find no such 'clear indication' here."

POINT II

The Court of Appeals demonstrated a complete lack of familiarity both with the functioning of New York's *Mitchell-Lama* Act and other provisions of New York's Public and Private Housing Finance Laws.

(1)

Further confusion in this litigation may be avoided by a complete deletion from the Second Circuit's opinion of its analysis relating to the defenses of the State and its Agency. The panel's rejection of the State's claim of immunity is predicated upon its citation of Private Housing Finance Law, § 32(5). A footnote in that opinion sets forth that section, with emphasis added (500 F. 2d 1246, 1256, fn. 12):

> "With regard to duties and liabilities arising out of this article the state, the commissioner or the super-

> vising agency may be sued *in the same manner as a private person.* No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation."*

With reference to the Housing Finance Agency, the panel completely overlooked the fact that the term "supervising agency" contained in the section quoted by Judge Oakes is strictly defined in Public Housing Law § 2, as follows (Subd. 15):

> "The comptroller in a municipality having a comptroller; in a municipality having no comptroller, the chief fiscal officer of such municipality; except that in the city of New York it shall be the housing and development administration."

The fact that the Agency is an "agency" does *not* qualify it as a "supervising agency". In fact, it is a financing agency. Private Housing Finance Law, Art. 3. Supervision of a state-aided limited profit company is actually assigned to the State Commissioner of Housing and Community Renewal, a person who has *not* even been made a party to this lawsuit. See Private Housing Finance Law, Art. 2; and Public Housing Law, § 3, subd. 1, Definitions (L. 1961, c. 398).

And if the purpose of this litigation is to impose any liability upon the Agency, that liability may be borne ultimately by the State itself, regardless of any prior statutory commitments or prohibitions. In this aspect of the case, this Court can not blink its eyes at the fact that in *Knight v. State, supra,* this same Circuit Court also pointed out (443 F. 2d, at p. 420) that Knight's suit against state

---

* The first sentence of this paragraph merely incorporated, with an appropriate addition of the words, "the supervising agency", the suability provision previously contained in Public Housing Law, § 15, as to the housing commissioner and the State. See 1964 New York State Legislative Annual, p. 342.

officers could be deemed a suit against the State, improperly brought; and noted the general rule in *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) that:

> "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "

See also the opinion of Judge McGowan for a unanimous court (Friendly, Ch. J. and Timbers, C.J.) in *Rothstein* v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) rehearing den. 411 U.S. 988 (1973), underlining the rule that any waiver of the shield of the Eleventh Amendment must be shown to be clear and unequivocal, citing *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944) and effectively distinguishing *Parden* (*supra*).

The waiver set forth in Private Housing Finance Law can not, on its face, be deemed to be a clear and unequivocal relinquishment of the State's immunity from *federal* court suit. Moreover, the Second Circuit's analysis completely disregards the fact that, as to obligations issued by the Agency itself specific judicial remedies are provided by New York Private Housing Law, § 50.

If the terms of the Finance Agency's mortgages are to be subjected to change by the federal district courts, and supervision of non-profit state-subsidized projects is to be subjected to the vagaries of a single District Judge's conception of a tenant's expectation of profit from participation in a non-profit cooperative enterprise, the District Court's assumption of jurisdiction for that purpose will be self-defeating. The wisdom and propriety of any additional subsidies to the plaintiffs should be determined by the people's representatives in the Legislature, not by the federal courts.

(2)

A short review of New York's recent housing history will help to demonstrate how the Court of Appeals deviated from accuracy in its analysis of the functions performed by the New York State Housing Finance Agency. The facts relating to the past efforts of New York State to attack and solve its problem of slum clearance and to provide adequate housing may aid the Court in understanding the different responsibilities of the Agency and the Commissioner of Housing and Community Renewal. We shall endeavor to limit our delineation of New York's housing history to the developments pertinent to that understanding.

New York has found it necessary to use its police power and other sovereign powers in the performance of its housing functions. Shortly after World War I, it deemed it necessary and adequate to suspend the remedy of summary eviction proceedings theretofore available to landlords. See *People ex rel. Durham R. Corp.* v. *LaFetra,* 230 N.Y. 429 (1921). It has found frequent occasion to exercise its police power in the form of "rent control." *Lincoln Bldg. Associates* v. *Barr,* 1 N Y 2d 413 (1956), app. dism. 355 U.S. 12 (1957). It has also utilized eminent domain to to provide public housing for persons of low income. *Matter of New York City Housing Authority* v. *Muller,* 270 N.Y. 333 (1936); after its experiment in providing *private* housing through limited dividend housing corporations under the State Housing Law (L. 1926, ch. 823) had proved inadequate as a solution (270 N.Y., at 342).

(A)

From the outset, the provisions of the State Housing Law (L. 1926, ch. 823) indicated clearly the intention of the Legislature that limited dividend housing projects, whether incorporated as "public limited dividend housing companies" under Article 3 or as "private limited dividend companies" under Article 4 of that statute were to be under

the control and supervision of the *"State Board of Housing"*, the predecessor of the *"State Commissioner of Housing"*, now known as the *"State Commissioner of Housing and Community Renewal"*.

The detailed supervisory powers of the Board included project approval (§ 13), examination of books and records (§ 15, subd. 3), the fixing of maximum rents in accordance with statutory limits (§ 16), establishment of reserves (§ 42), selection of one of the corporation's directors (§ 32), the power to enforce stock subscriptions if the company's board of directors did not do so (§ 34), the power to consent to mortgages, debt incurrance and the making of certain contracts (§ 38, subds. 3-11; 50).

In 1927, the State Board of Housing was renamed the "Board of Housing"; and its commissioners were redesignated as "members" of the Board (L. 1927, ch. 25). In 1928, the Board was given rule-making power (L. 1928, ch. 722, § 15, subd. 6 added). In 1932, the Board of Housing was continued as head of the Division of Housing in the Department of State (L. 1932, ch. 507, § 1). In 1938, the functions of the Division of Housing were transferred to the Executive Department (L. 1938, ch. 808). There they remained upon the enactment of the Public Housing Law (L. 1939, ch. 808).

The Public Housing Law, enacted in 1938, gave greater emphasis, in the solution of housing problems, to *public housing,* undertaken by municipal housing authorities, with the aid of federal, state and local subsidies. But, as to limited dividend housing, it made very little change, incorporating in one article of the law (Art. 9, §§ 170-193) and part of another (Art. 7, §§ 129-135), substantially all the provisions contained previously in the State Housing Law.

But where regulation previously had been by the State *Board,* the 1938 statute provided for regulation by the "Superintendent" of Housing; and approvals previously required by the Board, were to be obtained from the *Super-*

intendent (§ 11, *et seq.*, § 170, *et seq.*). Then in 1940, the title of the head of the Division of Housing was changed to "Commissioner of Housing" (L. 1940, ch. 148, § 3, subd. 1; § 11).

Some of this history as to the development of the regulatory functions of the Commissioner of Housing was reviewed in *Fruhling* v. *Amalgamated Housing Corp.*, 9 N Y 2d 541 (1961), app. dism. 368 U.S. 70 (1961). Another analysis of this housing history is to be found in the foreward to the Private Housing Finance Law (L. 1961, ch. 803; McKinney's Cons. Laws of New York, Annotated, Book 41, pp. vii-xii).

(B)

Not until 1955, with the enactment of the Limited Profit Housing Companies Law (L. 1955, ch. 407), popularly known as the Mitchell-Lama Law, did New York authorize the form of housing company involved in this litigation. By this form of housing, the State sought to meet the full impact of the then existing housing shortage by drawing upon its own credit and the credit of its municipalities to bridge the shortage of low-interest rate mortgage funds. Foreword to New York Private Housing Law (*supra*), p. ix.

With the enactment of the Private Housing Finance Law in 1961 (L. 1961, ch. 803, eff. March 1, 1962), the provisions controlling limited *dividend* housing companies were transferred to Article 4 of that statute (§§ 70-97); and those relating to limited *profit* housing companies to Article 2 thereof (§§ 10-37). In 1961 the title of the Commissioner of Housing was also revised to become "Commissioner of Housing and Community Renewal" (L. 1961, ch. 398). And *the Commissioner retained supervisory powers* over Mitchell-Lama limited profit companies as well as over limited dividend housing companies, 41 McKinney's Cons. Laws of New York, *supra*, Articles 2 and 4.

By the enactment of the same law the Agency was created as a "corporate governmental agency" which "through the issuance of its bonds, notes or other obligations to the private investing public" might attract a broad base of investment to obtain the funds necessary to provide mortgage loans to housing companies. Private Housing Finance Law, § 41.

(C)

The codification which placed Article 3 of the PHFL into the same volume with the Articles (2 and 4) dealing with Mitchell-Lama housing companies and limited dividend housing projects did not, as we have stated, divest the commissioner of that person's regulatory powers. It merely consolidated "without substantive change, various provisions of present law concerning governmental assistance to private enterprise for the construction of housing for families of middle income". See Governor Rockefeller's Memorandum of Approval. 41 McKinney's New York Private Housing Finance Law; foreword, p. xvii.

And the functions which were assigned in Article 3 of the 1961 statute to the new State Housing Finance Agency in no way limited the *regulatory* functions of the Commissioner of Housing and Community Renewal. Indeed, the Commissioner was, at first, designated as Chairman of the Agency (§ 43, subd. 2); but, later the Governor was authorized to designate a chairman "from among the members appointed by him" to the Agency (L. 1969, ch. 528, § 3).

The powers of the Agency were and are not supervisory. They are the powers to borrow money issue notes and bonds to obtain funds (PHFL, § 44, 46). The Agency's obligation to its creditors is to establish "reserve funds and obtain such appropriations from the state as might be required to maintain certain reserve funds at the amounts required by the statute (§ 47). *The Agency was and is*

given no authority to procure subscriptions to the stock of housing companies from any potential subscribers to such stock.

Hence there is no basis for predicating any liability upon the agency in connection with plaintiffs' stock subscriptions. Nor is there any basis at all—in either a state or federal court— for invoking as against the Agency the provision of the PHFL entitling the Agency "to sue and be sued" (PHFL, § 44). That remedy was placed there for potential bondholders or note-holders. Certainly, there was no basis for that portion of the Court of Appeals opinion (500 F. 2d 1246, 1256, fn. 12) which mistakenly applied to the Agency a statutory provision utterly inapplicable to the Agency.

Conclusion

The Second Circuit's decision ignores this Court's decision in *Edelman* v. *Jordan* (*supra*). On its face, the panel's decision completely ignores the Circuit's own holding in *Knight* v. *State, supra,* 443 F. 2d 415. It also ignores the philosophy of the decision in *Whitten* v. *State University Construction,* 493 F. 2d 177 (1st Cir. 1974). And its attempt to distinguish the recent decision in *Employees* v. *Missouri Public Health Employees,* 411 U.S. 279 (1973), on the ground that the State's housing activity came *after* the enactment of the federal securities laws is predicated upon a completely factual misconception; and a failure to recognize New York's long history of seeking to solve its housing problems by various methods including a State Housing Law (L. 1926, C. 823), which provided for limited divided housing companies (akin to limited-profit companies authorized by the Mitchell-Lama Act) *and state supervision* long before the Federal Securities Act of 1933. See *People* v. *Brooklyn Garden Apartments,* 283 N.Y. 373 (1940). See also *DeVoe* v. *Ostrander,* Civ. No. C 3, 74-95 (S.D. Ohio, decided Oct. 18, 1974), where the *Forman* rea-

soning as to waiver of State immunity for alleged improper regulation has already been rejected; and the cases cited therein.

The purpose of the Eleventh Amendment was to protect the States' fiscal integrity from attack in federal court. *Jordan* v. *Gilligan*, 400 F. 2d 701, 706. If the Second Circuit's theory in this case is adopted, it would substantially undermine that constitutional policy, for States would be target defendants in virtually every stock fraud case where they had done any regulation. States would be faced with huge contingent liabilities or the option of abandoning securities regulation. Neither result was intended by the Congress or the framers of the Eleventh Amendment.

The judgment of the Court of Appeals should be reversed and the complaint herein should be dismissed against the State and its Housing Agency.

Dated: New York, New York, March 2, 1975.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing Finance
Agency

Samuel A. Hirshowitz
First Assistant Attorney General

Daniel M. Cohen
Assistant Attorney General

Members of the Bar of the
United States Supreme Court
of Counsel